

State of Wisconsin  
**DEPARTMENT OF EMPLOYMENT RELATIONS**  
**-DIVISION OF MERIT RECRUITMENT AND SELECTION-**

**Date: March 26, 2001**

**Locator No.: MRS-211**

**Subject: Guidelines for A Restoration From the  
Unclassified Service, Pursuant to Sec.  
230.33, Wis. Stats.**

Recently, DMRS has received inquiries from both employees and appointing authorities regarding application of the right of restoration for employees on leave to the unclassified service who seek return to the classified service. This bulletin provides guidance regarding restoration under sec. 230.33, Wis. Stats.

**I. SEC. 230.33 RESTORATIONS ARE UNIQUE**

While rights of restoration exist for several personnel transactions (See s. ER-MRS 16.03, Wis. Adm. Code), restoration rights pursuant to sec. 230.33, Wis. Stats., are unique. A sec. 230.33 restoration has a different period of eligibility than exists for other types of restorations. (s. ER-MRS 16.025(3), Wis. Adm. Code.) Additionally, a sec. 230.33 restoration is the only type of restoration that provides: “. . . this section shall supercede any provision of law in conflict therewith. . . .” (Sec. 230.33(4), Wis. Stats.<sup>1</sup>) Under that provision, the rights under sec. 230.33, Wis. Stats., take precedence over other statutes and administrative rules, like Ch. ER-MRS 22, Wis. Adm. Code, when there is a conflict. The Personnel Commission has upheld the predominance of sec. 230.33 restoration rights over seniority considerations when it held that restoration rights to a position in the classified service are not controlled by seniority.<sup>2</sup> Further, under sec. 230.33 Wis. Stats., an employee’s restoration rights are to his/her former or equivalent position, not the other types of positions listed in ER-MRS 1.02(30), Wis. Adm. Code.

**II. RIGHTS ASSOCIATED WITH SEC. 230.33**

In order to be eligible for sec. 230.33 restoration rights, an employee must first meet the following requirements:

- completion of an original appointment probationary period in the classified service;
- appointment to the unclassified from the classified service; and

<sup>1</sup> There is one exception, which in all likelihood applies to only a very limited number of employees – those who were appointed to the unclassified service from the classified service prior to April 30, 1972, and have remained in the unclassified service since.

<sup>2</sup> Kelley v. DILHR, 93-0208-PC, 3/16/95.

- be on an approved leave of absence to the unclassified service, with a fully completed state form on file with the appropriate agencies.<sup>3</sup>

An employee who meets these requirements is eligible for leave to the unclassified service and restoration to the classified service as follows:

A. **Appointment to an Unclassified Position in His/Her Department**<sup>4</sup>

- an absolute right to a leave of absence without pay for the duration of the appointment plus three (3) months;
- restoration rights<sup>5</sup> to his/her former position or equivalent position in the department;
- accrual of seniority while in the unclassified service;
- reinstatement privileges for five (5) years from the date of appointment or for one (1) year after the termination of the appointment, whichever is longer. (Sec. 230.33(1m), Wis. Stats.)

B. **Appointment to an Unclassified Position in Another Department**

- if the employee's former appointing authority approves, a leave of absence without pay for the duration of the appointment plus three (3) months, as well as the restoration rights, reinstatement privileges and accrual of seniority noted in A. above;
- if the employee's former appointing authority does not approve a leave of absence, the employee only has the reinstatement privileges noted in A. above. (Sec. 230.33(2), Wis. Stats.)

Note: The right of restoration and reinstatement privilege are forfeited if the reason for termination of the unclassified appointment would also constitute the basis for discharge from his/her former position in the classified service. (Sec. 230.33(1), Wis. Stats.)

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<sup>3</sup> Appropriate documentation of any approved leave of absence for each appointment to the unclassified service is the responsibility of the Human Resources office of the agency granting the leave, even in situations where there is a restoration between different appointments to the unclassified service.

<sup>4</sup> Sec. 230.33(1), Wis. Stats., governs appointments to the unclassified by the governor, elected officer, judicial body or a legislative body or committee; appointments under that subsection are treated in the same manner as unclassified appointments by an appointing authority within the same department, pursuant to sec. 230.33(1)(m), Wis. Stats.

<sup>5</sup> Restoration is a mandatory reappointment. (s. ER 1.02(42), Wis. Adm. Code)

Additionally, restoration rights are to “the former position or equivalent position.” “The former position” is the same position (same position number) or another position assigned the same duties and responsibilities. An “equivalent position” is not equivalent merely because it has the same salary, hours and benefits. In adopting a standard used by the Wisconsin Supreme Court, the Commission has held that not only must the salary,<sup>6</sup> hours and benefits be the same, but the responsibilities, authority and status must also be the same.<sup>7</sup>

**[NOTE:** Human Resources staff are reminded that any restoration, even a restoration between different appointments to the unclassified service, must result in a reappointment to a “real” authorized position. This may include reappointment to a pool coded (surplus) position as approved by the Department of Administration, Division of Executive Budget and Planning.]

A further consideration is that sec. 230.33 restoration rights do not protect the employee indefinitely after he/she is restored to the classified service. Once restored<sup>8</sup> to the former or equivalent position, the employee is subject to subsequent personnel actions by the appointing authority in the same manner as classified employees who do not have restoration rights. Thus, should a reorganization or lay-off situation arise after the employee has been restored, that employee’s right to his former position or equivalent position no longer protects him/her from the consequences of lay-off or other movements pursuant to applicable laws or rules.

### **III. RECOMMENDED ANALYSIS WHEN RESTORING UNDER SEC. 230.33**

The following analysis should be used to facilitate a sec. 230.33 restoration in a lawful manner:

#### **A. Restoring the Employee to a Position**

- Determine if there is a vacancy in the employee’s former position:

If there is a vacancy, restore him/her to the former position.

If there is no vacancy, look to equivalent positions.

- Determine if there is a vacancy in an equivalent position:

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<sup>6</sup> The method used to calculate the compensation for an employee restoring pursuant to sec. 230.33, Wis. Stats., is set forth at III.B. of this bulletin.

<sup>7</sup> **Kelley v. DILHR, supra.**

<sup>8</sup> “Restored” refers to the act of mandatory reappointment to his/her former or equivalent position and the movement (layoff, transfer, displacement) of other employees to accommodate the restoration. Sec. 230.33 Wis. Stats., and **Kelley v. DILHR, supra**

If there is a vacancy, restore him/her to an equivalent position.

If there is no vacancy, then he/she must be restored to the former or equivalent position without regard to seniority.

- If movement of another employee to accomplish the restoration is necessary, the appointing authority must follow Ch. ER-MRS 22 (Layoff), Wis. Adm. Code. **[NOTE:** If a former career executive is to be restored, the provisions of Career Executive restoration (s. ER-MRS 30.11(2), Wis. Adm. Code), layoff (s. ER-MRS 30.105, Wis. Adm. Code) and reassignment (s. ER-MRS 30.07, Wis. Adm. Code) should be followed.] The appointing authority should establish a layoff group which does not include the restored employee and then determine the appropriate employee movements of those in the layoff group.<sup>9</sup>

#### **B. Determining the Appropriate Pay Upon Restoration**

Pay upon restoration from a leave to serve in an unclassified position is determined under s. ER 29.03(7), Wis. Adm. Code, or any applicable provisions of the Compensation Plan. The employee being restored shall receive the last base pay rate received in the position from which restoration rights are derived, plus intervening adjustments.<sup>10</sup> These adjustments shall be those of the appropriate collective bargaining agreement or the Compensation Plan, based on the pay schedule for the class from which the restoration rights are derived.

When an employee is to be restored to a broadband position, the Compensation Plan or certain collective bargaining agreements provide that, if the appointment maximum corresponding to that position is greater than the last rate received plus intervening adjustments, the appointing authority may set the employee's pay at a rate not to exceed the appointment maximum. The maximum adjustment that can be given is the total amount that would have been generated for each adjustment during the employee's leave had the employee been in the classified position on the effective date of each adjustment. The discretionary adjustments that would have been permitted to the employee had he/she remained in the classified service will thus create a range from which the appointing authority may choose to pay the individual who is being restored. This follows since agencies have discretion in how much of generated salary increase is distributed. If the adjustments that the employee would have been eligible for had he/she remained in the classified service result in a base pay rate upon restoration that is above the appropriate pay range maximum, the rate shall be red circled.

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<sup>9</sup> Employees who have to move as a result of a restoration may have rights to vacant positions in a bargaining unit, depending on which collective bargaining agreement governs.

<sup>10</sup> Discretionary Compensation Adjustments are specifically excluded from pay upon restoration calculations.

#### **IV. HYPOTHETICALS TO ILLUSTRATE RESTORATION TO A POSITION**

(For purposes of the following examples, assume that “Employee A” seeks restoration to the classified service from the unclassified service.)

##### **Example 1:**

###### **Facts**

Employee A’s former position is vacant.

###### **Action**

Restore Employee A to his/her former position.

##### **Example 2:**

###### **Facts**

Employee A’s former position is not vacant. However, a position with the same salary, hours, benefits, responsibility, authority and status is vacant.

###### **Action**

Restore Employee A to the equivalent position.

##### **Example 3:**

###### **Facts**

Neither Employee A’s former position nor an equivalent position are vacant.

Employee B who has less seniority than Employee A occupies his/her former position.

###### **Action**

Restore Employee A to his/her former position and provide Employee B with his/her lay off rights under Ch. ER-MRS 22, Wis. Adm. Code and rights to move to a vacant represented position. [NOTE: If Employee A is a former Career Executive, s. ER-MRS 30.11, s. ER-MRS 30.105, and s. ER-MRS 30.07, Wis. Adm. Code, should be followed.]

##### **Example 4:**

###### **Facts**

Same facts as in Example 3, except Employee B has more seniority than Employee A.

###### **Action**

Same Action as in Example 3.

**Example 5:**

**Facts**

Employee A's former position was eliminated.

Employee B and C occupy equivalent positions.

Employee A has more seniority than Employee B, but less seniority than Employee C.

**Action**

Employee A is restored to one of the two equivalent positions. The appointing authority establishes a layoff group that consists of Employees B and C and follows the rules of Ch. ER-MRS 22, Wis. Adm. Code, as well as any rights an employee may have to move to a vacant represented position. [NOTE: If Employee A is a former Career Executive, s. ER-MRS 30.11, s. ER-MRS 30.105 and s. ER-MRS 30.07, Wis. Adm. Code, should be followed.]

**Example 6:**

**Facts**

The duties of Employee A's former position have been changed and the position has been moved to another division.

Two equivalent positions remain—one occupied by Employee B and one by Employee C.

Employee A has less seniority than both Employee B and C.

**Action**

Same Action as in Example 5.

All inquiries regarding sec. 230.33 restorations, whether rights of restoration, layoff, classification or compensation issues, should be directed to Denny Huett, DMRS Policy Advisor, at (608) 266-7296, FAX: (608) 267-1000 or e-mail: [Denny.huett@der.state.wi.us](mailto:Denny.huett@der.state.wi.us).

When making an inquiry, please provide Denny Huett with a copy of the approved leave of absence form which serves as the basis for the employee's claim for mandatory restoration.

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